

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7007

United States Court of Appeals

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For the Second Circuit

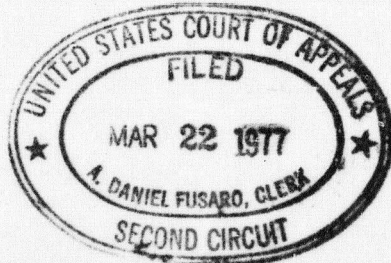
HARTFORD NATIONAL BANK & TRUST COMPANY,
Plaintiff-Appellant

against

WESTCHESTER FEDERAL SAVINGS & LOAN ASSOCIATION,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of New York

PLAINTIFF-APPELLANT'S REPLY BRIEF



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PLAINTIFF-APPELLANT'S REPLY BRIEF

POINT I

DEFENDANT-APPELLEE FAILED TO RESPOND
TO ITS OWN POSED ISSUE

A reading of Defendant-Appellee's ("Westchester's") Brief herein immediately emphasizes the untenable position of Westchester.

Westchester states, at page 1 of its Brief, that the Issue Presented for Review is:

"To whom does the money ... belong?"

A careful reading of the remainder of the Brief indicates that Westchester fails in any way to answer this question.

Westchester does not claim it for itself (Appendix, Page 28-a), nor has it submitted one shred of evidence to show that any tenant made claim to any part of the pledged monies. Are we to understand that this is a trust fund without beneficiaries, and that, therefore, Westchester is to hold the pledged monies forever?

POINT II

THE EXTRANEOUS MATTER IN DEFENDANT-APPELLEE'S BRIEF

Though no place in the Record, and with no reference to the Appendix, Westchester, at page 2 of its Brief, refers to the original opening of the account in question

... at or about the time that HYDE PARK closed a \$2,300,000.00 mortgage loan with WFS & LA, on the apartment house ...

This disclosure of new matter underlines the fact that the one time deposit was not "security deposits" of individual tenants but was the maintenance of a compensating balance account to sweeten Westchester's loan. Westchester was no mere stakeholder holding "fiduciary funds" for nameless tenants, but was holding these funds as a direct result of its mortgage loan of \$2,300,000.00.

It must be noted that at the time of the opening of the account, the only document released by Westchester to others (and not retained exclusively in Westchester's possession and control, e.g., Exhibits A (Appendix, Page 88-a) and Exhibit B (Appendix, Page 89-a)) was the passbook containing no words of restriction (Exhibit 4, Appendix, Pages 83-a to 86-a). The process of issuing such an unmarked passbook was consistent with a compensating balance account, but not with a "Rent Security Account".

POINT III

CONNECTICUT LAW IS APPLICABLE

As stated in Mallory Associates v. Barving Realty Co., 300 N.Y. 300 (1949) (cited in both Hartford's and Westchester's Briefs),

The provision in the lease for the deposit of security is a personal covenant between the contracting parties, creating rights in personam.

This, however, does not mean that New York statutes must be applied to the monies on deposit. In the instant case, the "contracting parties" were Hyde Park Company, a Connecticut limited partnership, located and doing business in Connecticut and the tenants residing in Connecticut. There is no testimony or evidence as to where the leases were made and the security deposits, if any paid, but logically it would be fair to assume that the leases were made in Connecticut and the security deposits, if any, were paid in Connecticut.

The entire transaction occurred in, and all the parties were at all times located in, Connecticut.

Compare this with the facts in the Mallory case where New York law, not Virginia, was applied: both the landlord and tenant were New York corporations, the lease was executed in New York and the security was paid over by the tenant to the landlord in New York. The only portion of the transaction not in New York was the physical location of the rented property in Virginia.

Furthermore, the contesting parties in Mallory were the contracting parties. In the instant case, the relationship of the parties is clearly not one of landlord and tenant, nor is Westchester the assignee of any tenants' rights under their leases with Hartford's pledgor.

Westchester's attempt to apply New York statutory law totally ignores the purpose of §233 of the Real Property Law as stated in In re: Pal-Playwell, Inc., 334 F. 2d 389 (C.A. 2, 1964), at page 391:

It is apparent that the statutory trust [created by Sec. 233 R.P.L.] is aimed at the landlord who jeopardizes the lessee's eventual recovery of his deposit.

Could it have been the intent of the New York Legislature to protect a Connecticut tenant from a Connecticut landlord under a lease executed in Connecticut and payment made in Connecticut when it declared tenants' security deposits as "trust funds" under §233 of the Real Property Law in 1935?

Neither the Mallory case, nor logic could require the application of the New York statute.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF CONNECTICUT
COUNTY OF FAIRFIELD

ss.:

Mark Levenson, being duly sworn, deposes and says:
on March 21, 1977 he mailed two copies of the Plaintiff-Appellant's
Reply Brief to Victor Pacor, Esq., the attorney for Defendant-
Appellee at 56 Harrison Street, New Rochelle, New York.

Mark Levenson
Mark Levenson

Sworn to before me this
21st day of March, 1977

W. L. M. I. L.
Commissioner of the Superior Ct.
Fairfield County